Tokio Marine Insurans (Malaysia) Bhd (which obtained all rights and liabilities of Amanah General Insurance Bhd vide vesting order dated 22 October 2002, wherein Amanah General Insurance Bhd was formerly Known as Trust International Insurance (M) Bhd prior to a change of name vide Form 13 dated 29 December 1997) v Mohd Radzi bin Zainuddin & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCC-707 OF 2011
NALLINI PATHMANATHAN JC
7 JUNE 2011

Civil Procedure — Injunction — Interim injunction — Injunction to restrain presentation of winding up proceeding — Pending recovery proceedings against plaintiff, defendants issued statutory notice against plaintiff demanding payment of judgment sum obtained in default judgment — Whether refusal to grant injunction would result in considerable and irreparable damage to plaintiff — Whether there was genuine dispute — Whether Pacific Orient Insurance Co Bhd v Muniammah Muniandy distinguishable from present case — Whether plaintiff's failure to obtain declaration that insurance was void or unenforceable fatal to its case — Road Transport Act 1987 s 96(1), (2) & (3)

On 6 July 1998, the defendants, were involved in an accident involving their motorcycle and another motor vehicle ('the motor vehicle') owned by one Teoh Choon Lai but driven by one Zolkanian bin Tajudin. The defendants claimed that the RIMV search report from the Wilayah Persekutuan branch office showed that Trust International, the plaintiff's predecessor, was the insurer of the motor vehicle during the material time, while the search from the Penang branch stated that Amanah General was the insurer of the motor vehicle. The plaintiff denied being the insurer at risk and requested for a copy of the cover note or other documents for its further consideration. The defendants filed their claim for damages pursuant to ss 96(2)(a) and 96(3) of the Road Transport Act 1987 ('the Act') against the plaintiff in the Telok Intan Sessions Court ('the sessions court suit'). The defendants obtained judgment in default in the sum of approximately RM3,929,192.80 plus interest ('the judgment sum') against the plaintiff in the sessions court suit. Thereafter the defendants filed recovery proceedings against the plaintiff pursuant to s 96(1) of the Act ('the recovery suit'). It was the plaintiff's defence in the recovery suit that the cover note relied upon by the defendants was incorrect or a forgery and was not issued by the plaintiff or its predecessors. While the recovery suit was still pending, the defendants had issued a statutory notice pursuant to s 218 of the

Companies Act 1965 against the plaintiff demanding for payment of the judgment sum. The plaintiff thus filed the instant application for an interim or fortuna injunction to restrain the defendants from filing an application to wind up the plaintiff based on the statutory notice of demand. According to the plaintiff the issue of whether it was the insurer for the motor vehicle was a live issue in the recovery suit and that pending final adjudication of this issue there was no debt due and owing from it to the defendants. As such, the defendants could not seek to wind up the plaintiff for failure to pay this debt. The defendants strongly opposed the grant of an injunction and argued that the only legal issue in this case was the statutory liability of the plaintiff to satisfy a judgment obtained by the defendants. It was the defendants' case that it had given the plaintiff insurer notice of proceedings when it filed its claim in the sessions court and that s 96 of the Act imposed a strict obligation upon an insurer to pay the judgment sum including interest and costs. The defendant also submitted that the plaintiff ought to have obtained a declaration that the insurance was void or unenforceable under s 96(3) when it was served with notification of the proceedings and that its failure to do so precluded it from doing so now. The main issue in this case was whether to grant an injunction to stay the presentation of the winding up petition pending the adjudication of the recovery suit.

Held, granting the plaintiff an interim injunction for until the disposal of the recovery suit:

(1) In construing s 96(1) of the Act it was settled law that in order to render a policy of insurance effective it was necessary for a certificate of insurance to be delivered to the person by whom the policy had been effected, namely the insured. In the instant case, the plaintiff maintained that no certificate of insurance had been delivered by the plaintiff to the defendants in the sessions court suit and that was, inter alia, the subject matter of its defence in the recovery suit. This court found the plaintiff's stand that the policy of insurance was not operative and that it therefore had no liability under the default judgment to be entirely justified. The refusal to grant an injunction at this juncture in the present factual matrix would result in considerable and irreparable damage to the plaintiff. This court found that there was a genuine dispute as to whether the plaintiff had insured the motor vehicle and that upon balancing all the factors in this case an injunction ought to be granted to stay the presentation of the winding up petition pending the adjudication of the recovery suit (see paras 35–41).

(2) The case of *Pacific & Orient v Muniammah Muniandy* [2011] 1 CLJ 497 ('*Pacific Orient's* case') that was relied upon by the defendants was distinguishable from the present case. In the Pacific Orient case there had been no dispute as to whether a policy of insurance had in fact been issued as was the case here. As the *Pacific Orient's* case was not an authority for

the proposition that an insurer who had not issued a certificate of insurance to the person claiming to be insured was obliged to pay under a judgment obtained against the person claiming to be insured, the plaintiff ought to be allowed to ventilate this issue in the recovery suit (see paras 42–45).

(3) This court found that s 96(3) of the Act dealt with a policy of insurance that was operative, there having been a compliance with s 96(1) of the Act. Section 96(3) of the Act did not preclude the plaintiff from putting forward its case, as that section appeared to deal with situations where the insurer had issued a policy of insurance and certificate of insurance and sought to avoid or cancel the same. Thus, if the injunction was not allowed in the present case then the plaintiff would be constrained to pay out the judgment sum notwithstanding that it claimed it never issued any policy of insurance to the persons claiming to be the insured (see paras 45–46).

[Bahasa Malaysia summary

Pada 6 Julai 1998, defendan-defendan terlibat dalam kemalangan yang melibatkan motosikal dan kenderaan motor lain ('kenderaan motor tersebut') yang dimiliki oleh Teoh Choon Lai tetapi telah dipandu oleh Zolkanian bin Tajudin. Defendan-defendan mendakwa bahawa laporan carian RIMV daripada pejabat cawangan Wilayah Persekutuan menunjukkan bahawa Trust International, pendulu plaintif, merupakan penanggung insurans kenderaan motor tersebut pada masa matan, manakala carian dari cawangan Pulau Pinang menyatakan bahawa Amanah General adalah penanggung insurans kenderaan motor tersebut. Plaintif menafikan menjadi penanggung insurans risiko dan meminta salinan nota perlindungan atau dokumen lain untukan pertimbang selanjutnya. Defendan-defendan telah memfailkan tuntutan mereka untuk ganti rugi menurut ss 96(2)(a) dan 96(3) Akta Pengangkutan Jalan Raya 1987 ('Akta tersebut') terhadap plaintif di Mahkamah Sesyen Telok Intan ('guaman mahkamah sesyen'). Defendan-defendan telah mendapat penghakiman ingkar bagi anggaran sejumlah RM3,929,192.80 berserta faedah ('jumlah penghakiman') terhadap plaintif dalam guaman mahkamah sesyen itu. Selepas itu defendan-defendan telah memfailkan prosiding mendapat kembali terhadap plaintif menurut s 96(1) Akta tersebut ('guaman mendapat kembali'). Ini adalah pembelaan plaintif dalam guaman mendapat kembali tersebut bahawa nota perlindungan yang mana defendan-defendan bergantung kepada tidak betul atau suatu yang palsu dan tidak dikeluarkan oleh plaintif atau pendulunya. Semasa guaman mendapat kembali itu masih belum selesai, defendan-defendan telah mengeluarkan notis statutori menurut s 218 Akta Syarikat 1965 terhadap plaintif menuntut bayaran jumlah penghakiman tersebut. Plaintif oleh itu telah memfailkan permohonan ini untuk injunksi interim atau fortuna bagi menghalang defendan-defendan daripada memfailkan permohonan menggulungkan plaintif berdasarkan notis tuntutan

statutori itu. Menurut plaintif isu sama ada ia adalah penanggung insurans untuk kenderaan motor tersebut merupakan isu semasa dalam guaman mendapat kembali tersebut dan bahawa sementara menunggu pengadilan isu ini selesai tiada hutang yang perlu dibayar dan tertunggak daripadanya kepada defendan-defendan. Jika begitu, defendan-defendan tidak boleh memohon untuk menggulungkan plaintif kerana kegagalan membayar hutang ini. Defendan-defendan jelas membantah pemberian injunksi berhujah bahawa satu-satunya isu perundangan dalam kes ini adalah liabiliti plaintif untuk meyakinkan penghakiman diperoleh oleh defendan-defendan. Ini adalah kes defendan-defendan bahawa ia telah memberikan notis prosiding kepada plaintif penanggung insurans apabila ia memfailkan tuntutannya di mahkamah sesyen dan bahawa s 96 Akta tersebut mengenakan obligasi ketat ke atas penanggung insurans untuk membayar jumlah penghakiman tersebut termasuklah faedah dan kos. Defendan-defendan juga berhujah bahawa plaintif patut telah mendapatkan deklarasi bahawa insurans itu tidak sah atau tidak boleh dikuatkuasakan di bawah s 96(3) apabila ia diserahkan dengan pemberitahuan prosiding dan bahawa kegagalannya untuk berbuat demikian telah menghalangnya daripada berbuat demikian sekarang. Isu utama dalam kes ini adalah sama ada untuk memberikan injunksi untuk menggantung presentasi petisyen penggulungan sementara menunggu pengadilan guaman mendapat kembali tersebut.

Diputuskan, membenarkan plaintif injunksi interim sehingga selesai guaman mendapat kembali:

(1) Dalam mentafsir s 96(1) Akta tersebut ia adalah undang-undang tetap bahawa bagi tujuan menjadikan polisi insurans itu berkesan adalah perlu agar sijil insurans itu dihantar kepada orang yang mana polisi itu dinamakan, iaitu pemegang insurans. Dalam kes ini, plaintif menegaskan bahawa tiada sijil insurans telah dihantar oleh plaintif kepada defendan-defendan dalam guaman mahkamah sesyen tersebut dan bahawa, antara lain, merupakan perkara penting pembelaannya dalam guaman mendapat kembali tersebut. Mahkamah ini berpihak kepada pendirian plaintif bahawa polisi insurans tersebut tidak operatif dan oleh itu tiada liabiliti di bawahnya penghakiman ingkar yang menjustifikasikan keseluruhannya. Keengganan untuk memberikan injunksi di peringkat ini dalam matriks faktual semasa akan mengakibatkan plaintif mengalami kerugian yang besar dan tidak dapat dipulihkan. Mahkamah ini mendapati bahawa terdapat pertikaian tulen berhubung sama ada plaintif telah menginsuranskan kenderaan motor tersebut dan bahawa setelah mengimbangi semua faktor-faktor dalam kes ini satu injunksi patut diberikan untuk menggantungkan pengemukaan petisyen penggulungan sementara menunggu pengadilan guaman mendapat kembali tersebut (lihat perenggan 35–41).

(2) Kes *Pacific & Orient v Muniammah Muniandy* [2011] 1 CLJ 497 ('kes

Pacific Orient') yang diguna pakai oleh defendan-defendan boleh dibezakan daripada kes ini. Dalam kes *Pacific Orient* tiada pertikaian berhubung sama ada polisi insurans sememangnya telah dikeluarkan seperti mana dalam kes ini. Oleh kerana kes *Pacific Orient* bukan autoriti untuk prinsip bahawa penanggung insurans yang tidak mengeluarkan sijil insurans kepada orang yang mendakwa ia diinsuranskan adalah bertanggungjawab untuk membayar di bawah penghakiman yang diperoleh terhadap orang yang mendakwa diinsuranskan itu, plaintif patut dibenarkan menguratakan isu ini dalam guaman mendapat kembali (lihat perenggan 42–45).

(3) Mahkamah ini mendapati bahawa s 96(3) Akta tersebut membincangkan polisi insurans yang operatif, yang mematuhi s 96(1) Akta tersebut. Seksyen 96(3) Akta tersebut tidak menghalang plaintif daripada mengemukakan kesnya, kerana seksyen tersebut dilihat sebagai membincangkan keadaan di mana penanggung insurans telah pun mengeluarkan polisi insurans dan sijil insurans dan memohon untuk mengelakkan atau membatalkan yang sama. Oleh itu, jika injunksi tidak dibenarkan dalam kes ini maka plaintif akan tersekat untuk membayar jumlah penghakiman tersebut meskipun ia mendakwa tidak pernah mengeluarkan apa-apa polisi insurans kepada mereka yang mendakwa telah diinsuranskan (lihat perenggan 45–46).]

Notes

For cases on interim injunction, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3425–3508.

Cases referred to

British India General Insurance v Dollah Sahari & Anor [1976] 2 MLJ 164, FC (refd)

Capital Insurance Bhd v Kasim bin Mohd Ali [1996] 2 MLJ 425; [1996] 3 CLJ 19, CA (refd)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation [1986] 2 MLJ 124, SC (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Mustafa bin Man & Anor v Pan Global Insurance Bhd [2003] MLJU 117; [2003] 8 CLJ 390, HC (refd)

National Insurance Co Ltd v Abdul Hafidz bin Haji Abdul Rahman & Anor [1983] 2 MLJ 105, FC (refd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2011] 1 CLJ 947, CA (distd)

People's Insurance Co (M) Sdn Bhd, The v Narayani a/p Raman (sekarang dikenali sebagai Tahan Insurance (M) Berhad) [2002] MLJU 628; [2003] 1 AMR 712, HC (refd)

A *Rafiah bte Bakar v East West-UMI Insurance Bhd* [1993] 1 MLJ 39, HC (refd)
Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Goh Thiam Hock [1999] 1 MLJ 179, HC (refd)

Legislation referred to

B Companies Act 1965 s 218, 218(1)(e)
Road Transport Act 1987 ss 91(4), 96, 96(1), (2), (2)(a), (3)

Anad Krishnan (Caroline George with him) (Anad & Noraini) for the plaintiff.
BS Sidhu (Sharon Sidhu and Norasmadi Mohd Sharif with him) (Norasmadi & Noraini) for the defendant.

C

Nallini Pathmanathan JC:

D **[1]** The plaintiff in this action, Tokio Marine Insurans (Malaysia) Bhd, ('the plaintiff') seeks vide summons in chambers dated 27 April 2011, an interim injunction or what is commonly referred to as a fortuna injunction, to restrain the defendants from filing an application to wind up the plaintiff, based on a demand dated 18 April 2011 issued by the defendants pursuant to s 218 of the
E Companies Act 1965. The defendants strongly oppose this application maintaining that there is a debt due and owing from the plaintiff to the defendant which is clear and undisputable.

SALIENT FACTS

F

[2] The background facts which are not substantially in dispute are that the defendants were involved in an accident involving their motorcycle bearing registration No WAR 5188 with another motor vehicle, bearing registration No PBW 7126 owned by one Teoh Choon Lai. At the time of the accident the
G vehicle PBW 7126 was driven by one Zolkanian bin Tajudin. The accident took place on 6 July 1998 along Jalan Ferry from the direction of Lumut towards Kuala Lumpur.

[3] The plaintiff was asked to confirm if they were insurers for the vehicle
H bearing registration No PBW 7126 for the period between 5 November 1997 and 4 November 1998. The plaintiff advised the defendants' solicitors vide letter dated 9 April 2004, after investigation that they had no records of having insured that vehicle at the time of the accident. In other words, they denied being the insurer at risk. The plaintiff requested for a copy of the cover note or
I other documents for the plaintiff's further consideration and action.

[4] On 22 April 2004, the plaintiff received a letter from the defendant's solicitors enclosing RIMV searches from the Road Transport Department's Wilayah Persekutuan and Pulau Pinang branches. The Wilayah Persekutuan

branch office RIMV search stated that Trust International was the insurer of the vehicle No PBW 7126 owned by Teoh Choon Lai for the period between 5 November 1997 and 4 November 1998 vide policy No 258696 while the search from the Penang branch states that Amanah General was the insurer of the vehicle vide the same policy number.

[5] The plaintiff was then served with a copy of the cause papers in Sessions Court Summons No 52–190 of 2004 ('the Teluk Intan suit') in relation to the accident. Upon receipt of the same the plaintiff vide letter dated 12 August 2004, again informed the defendants' solicitors that it had not issued the cover note that they had sent to the plaintiff. Neither, according to their records, had Trust International nor Amanah General Insurance Bhd issued the same. As such the plaintiff maintained that it was not the insurer in relation to the cover note. No lawyer was therefore appointed to appear in the Teluk Intan suit. Judgment was entered against the defendants in the Teluk Intan suit namely Teoh Choon Lai and Zolkanian bin Tajudin. Thereafter there was a hearing of assessment of damages and the defendants obtained judgment on 18 September 2006 in the sum of 'approximately RM3,929,192.80 plus interest' in the Teluk Intan suit.

[6] The plaintiff then on 30 October 2007 filed an originating summons in the Ipoh High Court seeking various declarations including a declaration that the cover note bearing No 25896 for the period between 5 November 1997 and 4 November 1998 for the aforesaid vehicle was not issued by Trust International Insurance (M) Bhd, Amanah General Insurance Bhd or the plaintiff. Additionally, a declaration was sought that the plaintiff was not responsible for and/or liable to meet any action or claim or judgment under the said cover note, particularly the judgment in default obtained at the Teluk Intan Sessions Court.

[7] In or around 17 March 2008, the defendants' solicitors filed recovery proceedings against the plaintiff at the Ipoh High court vide Suit No 22–57 of 2008 ('the recovery suit') pursuant to s 96(1) of the Road Transport Act 1987.

[8] As the issues in both the originating summons and the recovery suit were similar, the plaintiff withdrew the originating summons to avoid a multiplicity of proceedings. The recovery suit is currently being heard at the Ipoh High Court.

[9] In the recovery suit the plaintiff here has filed a defence setting out various grounds on which it maintains that the cover note in issue could not have been issued by its predecessor, namely Trust International Insurance (M) Bhd contending, inter alia, that:

(a) as the cover note in issue in relation to vehicle bearing registration No

PBW 7126 was issued prior to 5 November 1997, all cover notes issued as of that date would have been issued under the name of Trust International (M) Bhd;

(b) cover notes issued during that period by Trust International (M) Bhd bear a series of numbers that differ significantly from that produced in respect of PBW 7126 which was 258696;

(c) cover notes issued by Amanah General Insurance Bhd for the period after the change of name also, it is contended would not have the No 258696 as the cover notes issued by Amanah at that time commenced with the digit '0' followed by five digits;

(d) the plaintiff further contends that when it took over the rights and liabilities of Amanah General Insurance Bhd vide vesting order dated 22 October 2002, the serial numbers for cover notes had yet to reach the No 258696. Accordingly it is contended that the records of RIMV are erroneous and unreliable; and

(e) as Amanah General Insurance Bhd was not in existence prior to 5 November 1997, the Road Transport Department's Penang branch certifying the name of the insurer on the said cover note as Amanah General Insurance Bhd was clearly erroneous, it is alleged.

[10] It is evident from the foregoing contentions that the plaintiff contends, by way of defence in the recovery suit in the Ipoh High Court that the cover note relied upon by the present defendants is incorrect, or a forgery and was not issued by the plaintiff or its predecessors. I must state that the veracity or otherwise of these assertions is very much a matter for adjudication in the Ipoh High Court recovery suit, and this court may not, unwittingly or otherwise in any way encroach upon this issue which is alive in that court. Any pronouncement by this court impinging on those issues would be incorrect as it might well amount to issue estoppel which would defeat the purpose of the recovery suit. Bearing this reminder firmly in my mind, I proceed to consider the rest of the matter before me in this court.

[11] Notwithstanding that the recovery suit was still pending, the present defendants, through their solicitors Messrs Norasmadi & Noraini issued a statutory notice dated 18 April 2011 pursuant to s 218 of the Companies Act 1965 demanding for payment of the judgment sum premised on the judgment obtained at the Teluk Intan Court. The judgment of the Teluk Intan Sessions Court dated 18 September 2006 reads in part as follows (when translated):

> … It is therefore adjudged this day by way of judgment in default that the defendants are 100% responsible and that they are to pay damages as follows:-
>
> … (particulars of the damages) …

[12] The defendants in the Teluk Intan suit are Zolkanain bin Tajudin, the rider of the vehicle and Teoh Choon Lai the owner of the vehicle. The judgment sum claimed in the s 218 notice premised on this judgment is RM6,138,958.85 with continuing interest.

[13] The plaintiff therefore seeks injunctive relief in the form of a fortuna injunction against the defendants in this suit, the plaintiffs in the teluk intan suit, pending the adjudication of the recovery suit. In essence the plaintiff submit that the issue of whether or not the plaintiffs were the insurers for the vehicle PBW 7126 a live issue in the Ipoh High Court and pending final adjudication of this issue they maintain that the defendants here have no basis on which to seek recovery from them for this sum, and moreover, seek to wind up the plaintiff for failure to pay this debt. In short they maintain that there is no debt due and owing from them to the defendants and that additionally the issue of whether or not such a liability exists is the subject matter of the recover suit in the Ipoh High Court.

[14] In support of their claim they refer, inter alia, to *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 where the Court of Appeal held that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of process of court:

> … Fortuna Holdings made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of process of court. It was also clear that two distinct branches emanate from the principle — of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim by a procedure which might produce irreparable damage to the company, rather than a suitable alternative procedure.

THE DEFENDANTS' CASE

[15] The defendants strongly oppose the grant of an injunction maintaining, inter alia, that the only legal issue in this case concerns the statutory liability of the plaintiff to satisfy a judgment obtained by the defendants. They point to s 96 of the Road Transport Act 1987 ('the Act'), stating that where a third party who obtains judgment against an insured motorist for injuries suffered by the third party in a road accident is entitled to call upon the insurer of the motorist to satisfy the judgment in accordance with the provisions of the Act. The only exception by which an insurer may avoid liability, they maintain, is pursuant to s 96(3) of the Act which provides:

A … if before the date the liability was incurred the insurer had obtained a declaration from the court that the insurance was void or unenforceable.

[16] The plaintiff here, they maintain, did not obtain any such declaration from court.

B

[17] The defendants here then point to the fact that as far as they are concerned:

C (a) notice of commencement of proceedings was given to the plaintiff when the defendants filed their claim for damages in the Teluk Intan Sessions Court pursuant to ss 96(2)(a) and 96(3) of the Act;

(b) the judgment was duly served on the plaintiff;

D (c) there was no appeal against the said judgment;

(d) the said judgment has not been set aside;

(e) no stay of execution was obtained by the plaintiff;

E (f) no declaration under s 96(3) of the Road Transport Act 1987 was obtained by the plaintiff to the effect that they are entitled to avoid payment of the judgment sum; and

(g) accordingly the said judgment does not amount to a disputed debt and the said sum is therefore statutorily due from the plaintiff to the

F defendants.

[18] The defendants, through learned counsel then elaborated at some depth on each of the items above concluding that as a consequence of the foregoing,

G they were fully entitled to present a winding up petition against the plaintiff. They maintain that s 96 of the Act imposes a strict obligation upon an insurer to pay the judgment sum including interest and costs to the defendants, and is an exception to the doctrine of privity of contract, (see *Rafiah bte Bakar v East West-UMI Insurance* [1993] 1 MLJ 39.

H

[19] Section 96 of the Act reads as follows:

(1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of

I sub-section (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable hereunder in respect of the liability,

including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[20] Section 96(2) sets out the circumstances in which the insurer is not bound to make any payment under the judgement and includes a situation in which the insurer was not given notice of the proceedings, where there is a stay of execution pending appeal, or if before the happening of the incident giving rise to the damage the policy was cancelled by mutual consent, in the event the certificate of insurance has been lost or destroyed or surrendered as set out in s 96(2).

[21] Section 96(3) stipulates:

No sum shall be payable by an insurer under section (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable.

[22] With a proviso to the effect that the benefit of the section is not available to an insurer unless he has given notice of proceedings to the plaintiff, specifying the grounds on which it is sought to avoid the policy.

[23] The defendants in this suit submit that as the plaintiff failed to procure a declaration under s 96(3) it is bound to make the payment under the judgment sum as envisaged by s 96(1). They maintain that the plaintiff has simply stated that it is not the insurer that issued the cover note without more, and as such, this amounts to a bare averment which does not entitle the plaintiff to avoid payment under the policy. They maintain that the notice that was accorded to the plaintiff was to enable it to obtain the requisite declaration. The onus it is maintained is on the plaintiff to prove why it is entitled to avoid payment (see *British India General Insurance v Dollah Sahari & Anor* [1976] 2 MLJ 164; *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corporation* [1986] 2 MLJ 124.

[24] The defendants therefore contend that there are no merits in the plaintiffs averments that the defendant had not obtained judgment against the plaintiff personally, that the defendants needed to file recovery proceedings before taking steps to wind up the plaintiff company; that the defendants had abused the process of the court when issuing the s 218 notice and in maintaining that irreparable damage would be caused to the plaintiff which could not be compensated in costs.

[25] The defendants rely on *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2011] 1 CLJ 947 where the appellant was the insurer of a motorcycle ridden by the insured which was involved in a road accident

with the respondent. The respondent filed an action against the insured and obtained judgment in December 2009 whereby the insured was ordered to pay the respondent RM89,374.03 in damages. The insurer obtained leave to appeal to the Court of Appeal against the said judgment. The insurer's application for a stay of execution was dismissed by the High Court and the application for a stay of execution at the Court of Appeal was still pending. The insurer did not make payment to the respondent on the said judgment, whereupon a s 218 notice was issued. An ex parte injunction was granted but discharged upon the hearing of the inter parties application.

[26] In these circumstances the insurer appealed claiming, inter alia, that the respondent had not obtained any judgment against the appellant personally but against the insured person; the respondent needed to file recover proceedings under s 96(1) of the Act, there was an abuse of the court's proceedings when the s 218 notice was used by the respondent as a tool to oppress the insurer, the insurer was a solvent company and irreparable damage would ensue if the injunction was not granted.

[27] The Court of Appeal dismissed the appeal with costs. Ramly Ali JCA stated as follows:

> … s 96(1) imposes upon the insurer the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is affected in respect of any third party risk covered under the policy. Thus the appellant was obliged statutorily to pay the respondent who had obtained the said judgment. The insurer would only be able to avoid payment obligation under the circumstances and conditions mentioned in s 96(2) and (3) of the RTA 1987. None of the said exceptions applied to allow the appellant to avoid its statutory obligations on the policy. Therefore the judgment debt of the insured became judgment debt of the appellant (insurer) by virtue of s 96(1).

[28] The Court of Appeal further held, inter alia, that the respondent could recover the monetary judgment by way of a statutory demand under s 218(1)(e) of the Companies Act 1965. Nowhere, it was pointed out, did the section state that the respondent had to first obtain another judgment against the insurer before proceeding to enforce the judgment against the insured. Therefore the question of the respondent having to file recover proceedings under s 96(1) against the insurer did not arise at all. As there was a judgment against the insurer that had not been stayed, the respondent had aright under s 96(1) to enforce the said judgment against the insurer without having to first file recovery proceedings.

[29] The court concluded that a fortuna injunction might be granted where the presentation of the petition might produce irreparable damage and where

the proposed petition has no chance of success. In that case it was held that the principle was not applicable because the respondent had obtained a valid and enforceable judgment against the insured as well as the insurer, the intended petition if filed was not bound to fail. On the contrary he had a good chance to succeed. The issue of irreparable damage, it was held, was of no consequence, whereupon the injunction was not granted (see also *Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v Goh Thiam Hock* [1999] 1 MLJ 179).

[30] The foregoing appears to be the crux of the matter before this court. Can it be said on an application of the foregoing case that the plaintiff in the instant case is bound to make payment under the Teluk Intan judgment, notwithstanding that recovery proceedings under s 96(1) have not been adjudicated upon and heard in full?

[31] The other issue that arises for consideration is whether the statutory liability under s 96(1) has arisen in the instant case warranting the payment of the judgment sum by the plaintiff here. This requires a construction of s 96(1) of the Act.

[32] I have read the comprehensive submissions of both learned counsel for the plaintiff and the defendants. Having considered the same in their entirety, I shall now consider each of the issues I have set out above in deciding whether or not to grant the fortuna injunction. Ultimately if upon a construction of s 96(1) and the requisite case-law particularly that of *Pacific & Orient v Muniammah Muniandy*, I am of the view that there is no genuine and disputed debt, such that the issuance of the s 218(1)(e) notice is fully justified, then it follows that the injunction ought not to be granted. If on the other hand on a consideration of these issues, I conclude that there is a genuinely disputed debt that requires adjudication, and that the construction and interpretation of s 96(1) favours the plaintiff's stance, then it follows that the fortuna injunction ought to be granted, pending the adjudication of the s 96 recovery proceedings in Ipoh High Court.

[33] With respect to s 96(1) of the Act I respectfully refer to the decision of the Federal Court in *National Insurance Co Ltd v Abdul Hafidz bin Haji Abdul Rahman & Anor* [1983] 2 MLJ 105 where the Federal Court construed s 80(1) of the Road Traffic Ordinance which is pari material with s 96(1)of the Act. Salleh Abbas CJ held, inter alia, as follows:

> Section 80(1) of the Ordinance with its complex sentence is by no means an easy section to construe. But it is clear from it that the insurer liable to satisfy the judgment under the section must be the one who —
>
> (1) has delivered a certificate of insurance under sub-s (4) of s 75;

A (2) has undertaken to indemnify his insured against such liability as is required to be covered under para (b) of sub-s (1) of s 75 (being a liability covered by the terms of the policy); and

(3) the judgment it has to satisfy is one which is given against any person insured by the policy.

B

[34] On the facts of that case it was not in issue that each of the defendant insurers had delivered their certificate of insurance to their respective insured, thus rendering both the policies effective for the purpose of the then ordinance.

C

[35] It is evident from the foregoing that in construing s 96(1)of the Act, in order to render a policy of insurance effective for the purposes of the Act, it is necessary, as a precondition for a certificate of insurance to be delivered by the insurer to the person by whom a policy has been effected.

D

[36] Such a construction is borne out, inter alia, by *Capital Insurance Bhd v Kasim bin Mohd Ali* [1996] 2 MLJ 425; [1996] 3 CLJ 19, *The People's Insurance Co (M) Sdn Bhd v Narayani a/p Raman (sekarang dikenali sebagai Tahan Insurance (M) Berhad)* [2002] MLJU 628; [2003] 1 AMR 712; *Mustafa bin Man & Anor v Pan Global Insurance Bhd* [2003] MLJU 117; [2003] 8 CLJ 390. In this context learned counsel for the defendants sought to submit that *Capital Insurance Bhd v Kasim bin Mohd Ali* where Justice Siti Norma Yaakob held that an RIMV search report is not evidence of delivery of a certificate of insurance as required by s 96(1) was overruled by the Federal Court. I agree with learned counsel for the plaintiff that Her Ladyship's decision was not overruled on this point. In fact the issue before the Federal Court was whether the judgment of the court of appeal was a nullity or an irregularity as the respondent or claimant had died during the pendency of the appeal and no order for substitution and/or leave to carry on with the appeal was made. The Federal Court held that the judgment of the Court of Appeal was irregular and ordered are hearing of the appeal before a differently constituted corum which in turn proceeded to dismiss the appeal on a preliminary issue, namely that the record of appeal was defective.

E

F

G

H

[37] In any event in *The People's Insurance Co Ltd v Narayani a/p Raman* (above) and *Mustafa bin Man & Anor v Pan Global Insurance*, the courts have held that an RIMV search is not evidence of the delivery of a certificate of insurance as required under s 96(1). In any event s 96(1) (as reproduced above) makes express reference to s 91(4) of the Act. It states: '… If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected,….'

I

[38] Section 91(4) provides: '… A policy shall be of no effect for the

purposes of this Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.'

[39] It is clear from the foregoing that the certificate of insurance referred to in s 96(1) as a precondition for a policy of insurance to become effective is to be in the prescribed form and containing particulars of any conditions subject to which the policy is issued and of other prescribed matters. An RIMV search clearly does not fall within the ambit of a certificate of insurance as envisaged in s 96(1).

[40] From the foregoing I have no hesitation in concluding that it is indeed a condition precedent that before a policy of insurance becomes effective, it is necessary for a certificate of insurance to be delivered to the person by whom the policy has been effected, namely the insured.

[41] In the instant case, the plaintiff maintains that no certificate of insurance has been delivered by the plaintiff to the defendants in the Teluk Intan suit and that is, inter alia, the subject matter of their defence in the recovery suit. For this reason they maintain that the policy of insurance is not operative and that they therefore have no liability under the said judgment. This is a matter for adjudication in the Ipoh High Court and pending such adjudication, they seek the present injunction. This appears to be this court to be entirely justified, as in the instant case the plaintiff has consistently taken the position that they never insured the driver or the owner of the vehicle bearing registration No PBW 7126. They challenge the defendants to produce a certificate of insurance, which they maintain, correctly, is a pre-condition to the policy of insurance becoming effective. In these circumstances it appears to the court that the plaintiff's contention cannot be dismissed as an attempt to avoid or circumvent liability under the judgment. The plaintiff appears to have a bona fide basis for contending that it is not the insurer and seeks an opportunity to be heard in the recovery suit in the Ipoh High Court. The refusal to grant an injunction at this juncture in the present factual matrix would result in considerable and irreparable damage to the plaintiff as there appears to be a genuine dispute as to whether there is really a debt due and owing by it to the defendants.

[42] This brings me to the case of *Pacific & Orient v Muniammah Muniandy*. The case is distinguishable from the present case as in that case it was not in issue that the insurer concerned had in fact issued the certificate of insurance as required under s 96(1). In other words, it was not in dispute that the insurer there was the one who had insured the respondent's vehicles. This is evident from the decision of Ramly Ali JCA where His Lordship held, as I have reproduced above:

> … *s 96(1) imposes upon the insurer the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is effected* in respect of any third party risk covered under the policy. (Emphasis added.)

[43] It is evident from the foregoing that in keeping with all the cases cited above in relation to the construction of s 96(1), His Lordship held that the obligation to pay the person who had obtained judgment against the insured arose after a certificate of insurance had been duly delivered to the person by whom the policy is effected. The foregoing case is not authority for the proposition that an insurer who has not issued a certificate of insurance to the person claiming to be insured is obliged to pay under a judgment obtained against the person claiming to be insured. The *Pacific & Orient* case is therefore distinguishable in the present context where the insurer has held from the outset that he is not liable. The insurer is entitled to be heard in his defence on this issue which is currently being heard by the Ipoh High Court.

[44] The final issue for consideration is the legal contention put forward by learned counsel for the defendants to the effect that the only option that was available to the plaintiff from the outset, when they were served with notification of the proceedings in Teluk Intan was to have obtained a declaration under s 96(3) to the effect that the insurance was void or unenforceable. As the plaintiff did not do so, it is contended that they are now precluded from doing so. Learned counsel for the plaintiff maintains that such an interpretation is incorrect, and that the provision applies to a situation where the insurer having delivered a certificate of insurance to the insured, intends to avoid liability under the policy whereupon it is incumbent upon such an insurer to have the policy declared void.

[45] I am inclined to agree with such an interpretation. Section 96(3) follows upon s 96(1) and appears to my mind to be dealing with a policy of insurance that is operative, there having been compliance with s 96(1). It cannot be read in vacuo as applying to an instance where the insurer denies having issued the policy of insurance and where no certificate of insurance has been produced, merely an RIMV search, to evidence the existence of such a policy. If the plaintiff had indeed been the insurer at the outset and then sought to avoid the

policy or cancel the same, then s 96(3) would have come into play. Furthermore it would be untenable for an insurer who had not issued an insurance policy to be held liable simply because he had failed to procure a declaration to that effect. This too, when the insurer seeks to put forward his case in the recovery proceedings to explain why he claims not to have issued the policy of insurance. If indeed the injunction is not allowed then the insurer would be constrained to pay out the judgment sum notwithstanding that he claims he never issued any policy of insurance to the persons claiming to be the insured here. That would lead to an absurd result.

[46] I cannot emphasise sufficiently that I do not wish to encroach upon the adjudication of the recovery suit in the instant case. For that purpose I wish to clarify that I have made no findings in this case, save to consider on balancing all the factors in this case, whether or not to grant an injunction to stay the presentation of a winding up petition pending the adjudication of the recovery suit in the Ipoh High Court. Having done so, it appears to me that:

(a) there is a genuine dispute about whether or not the plaintiff in this suit insured the defendants in the Teluk Intan suit. I arrive at that conclusion, inter alia, on a construction of s 96(1) of the Act and a consideration of the background facts of this case. I hasten to add that I have made no findings in this regard;

(b) the plaintiff ought therefore to be allowed to ventilate this issue in the recovery suit. If an injunction is not granted the plaintiff would effectively be precluded from putting forward his case would not be heard in his own defence, in breach of the rules of natural justice;

(c) Section 96(3) does not, in my view preclude the plaintiff from so putting forward his case, as that section appears to deal with situations where the insurer had issued a policy of insurance and certificate of insurance and seeks to avoid or cancel the same; and

(d) the instant case is distinguishable from *Pacific & Orient v Muniammah Muniandy* as in that case it was not in issue that the insurer had in fact issued the certificate of insurance. There was no dispute as to whether a policy of insurance had in fact been issued, as is the case here.

[47] In all the circumstances of this case, I am satisfied that the plaintiff has shown that there is a genuine dispute and that the presentation of a winding up petition at this juncture would indeed amount to an abuse of process and harassment n view of the pending recovery suit in the Ipoh High Court. I

therefore allow the inter partes interim injunction to continue as prayed for until the disposal of the recovery suit. The plaintiff is granted an OIT of encl 4.

Plaintiff granted an interim injunction for until disposal of recovery suit.

Reported by Kohila Nesan